

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                                 |   |                        |
|---------------------------------|---|------------------------|
| EVE POLLACK,                    | ) | Case No. CV 06-2693 JC |
| Plaintiff,                      | ) |                        |
| v.                              | ) | MEMORANDUM OPINION     |
|                                 | ) |                        |
| MICHAEL J. ASTRUE, <sup>1</sup> | ) |                        |
| Commissioner of Social          | ) |                        |
| Security,                       | ) |                        |
| Defendant.                      | ) |                        |

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**I. SUMMARY**

On May 5, 2006, plaintiff Eve Pollack (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have filed a consent to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross-motions for summary judgment, respectively (“Plaintiff’s Motion) and (“Defendant’s Motion”). The

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<sup>1</sup>Michael J. Astrue is substituted as Commissioner of Social Security pursuant to Fed. R. Civ. P. 25(d)(1).

1 Court has taken both motions under submission without oral argument. See Fed.  
2 R. Civ. P. 78; L.R. 7-15; May 16, 2006 Case Management Order, ¶ 5.

3 After consideration of the record as a whole and the applicable law,  
4 Defendant's Motion is granted, and Plaintiff's Motion is denied because the  
5 decision of the Administrative Law Judge ("ALJ") is supported by substantial  
6 evidence and is free from material error.<sup>2</sup> The Court finds that the ALJ presented  
7 specific findings with clear and convincing reasons to discount plaintiff's  
8 testimony regarding her subjective complaints and allegations of disabling  
9 limitations.

## 10 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE** 11 **DECISION**

12 On October 9, 2003, plaintiff filed an application for Disability Insurance  
13 Benefits. (Administrative Record ("AR") 89). Plaintiff asserted that she became  
14 disabled on October 3, 2002, due to multiple sclerosis, loss of feeling in her arms  
15 and legs, dizziness and "not thinking straight." (AR 98). On March 16, 2004,  
16 plaintiff also alleged that she suffers from daily migraine headaches, fatigue  
17 "somedays," and blurry vision. (AR 129). An ALJ examined the medical record  
18 and heard testimony from plaintiff (who was represented by counsel), two medical  
19 experts, and a vocational expert on April 15, 2005. (AR 46, 362-406).

20 On June 15, 2005, the ALJ determined that plaintiff was not disabled  
21 through the date of the decision. (AR 34-48). Specifically, the ALJ found:  
22 (1) plaintiff suffered from the following severe impairments: carpal tunnel

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27 <sup>2</sup>The harmless error rule applies to the review of administrative decisions regarding  
28 disability. See Batson v. Commissioner, 359 F.3d 1190, 1196 (9th Cir. 2004) (applying harmless  
error standard); see also Stout v. Commissioner, 454 F.3d 1050, 1054-56 (9th Cir. 2006)  
(discussing contours of application of harmless error standard in social security cases).

1 syndrome, migraine headaches, obesity and asthma (AR 38, 46);<sup>3</sup> (2) plaintiff's  
 2 impairments, considered alone or in combination, did not meet or medically equal  
 3 one of the listed impairments (AR 42, 46); (3) plaintiff had the following residual  
 4 functional capacity: (a) she could (i) lift/carry twenty pounds occasionally and ten  
 5 pounds frequently; (ii) stand/walk for six hours of an eight hour day; (iii) sit for  
 6 six hours of an eight hour day; and (iv) climb ramps and stairs frequently; (b) she  
 7 was unable to climb ladders, ropes and scaffolds; (c) she must avoid (i) all  
 8 exposure to vibration; and (ii) more than occasional exposure to airborne irritants  
 9 above street level; and (d) she had limited concentration, persistence and pace due  
 10 to fatigue resulting in a limitation to simple, i.e., no more than four step, tasks.  
 11 (AR 42, 46-47);<sup>4</sup> (4) plaintiff could not perform her past relevant work (AR 45,  
 12 47); (5) plaintiff could perform a significant number of jobs in the national  
 13 economy, including cashier II, electronics worker and counter clerk (AR 45, 47);  
 14 and (6) plaintiff's allegations of disabling symptoms and limitations were not  
 15 credible. (AR 42-45, 47).

16 Plaintiff sought review of the ALJ's decision and submitted additional  
 17 materials for consideration by the Appeals Council. (AR 8-9, 14, 28-30). The  
 18 Appeals Council denied plaintiff's application for review. (AR 5-8).

### 19 **III. APPLICABLE LEGAL STANDARDS**

#### 20 **A. Sequential Evaluation Process**

21 To qualify for disability benefits, a claimant must show that she is unable to  
 22 engage in any substantial gainful activity by reason of a medically determinable  
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 25 <sup>3</sup>The ALJ also discussed evidence regarding plaintiff's alleged multiple sclerosis. (AR  
 26 41-42). The ALJ appears to have adopted the opinion of the testifying medical expert that  
 27 plaintiff's alleged multiple sclerosis was not a medically determinable impairment. (AR 37, 38,  
 28 41-42).

<sup>4</sup>The ALJ further noted that plaintiff's depressive disorder caused a mild restriction of the  
 activities of daily living, mild difficulties in maintaining social functioning, mild difficulties in  
 maintaining concentration, persistence, or pace, and no episodes of decompensation. (AR 46).

1 physical or mental impairment which can be expected to result in death or which  
2 has lasted or can be expected to last for a continuous period of at least twelve  
3 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.  
4 § 423(d)(1)(A)). The impairment must render the claimant incapable of  
5 performing the work she previously performed and incapable of performing any  
6 other substantial gainful employment that exists in the national economy. Tackett  
7 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

8 In assessing whether a claimant is disabled, an ALJ is to follow a five-step  
9 sequential evaluation process:

- 10 (1) Is the claimant presently engaged in substantial gainful activity? If  
11 so, the claimant is not disabled. If not, proceed to step two.
- 12 (2) Is the claimant's alleged impairment sufficiently severe to limit  
13 her ability to work? If not, the claimant is not disabled. If so,  
14 proceed to step three.
- 15 (3) Does the claimant's impairment, or combination of  
16 impairments, meet or equal an impairment listed in 20 C.F.R.  
17 Part 404, Subpart P, Appendix 1? If so, the claimant is  
18 disabled. If not, proceed to step four.
- 19 (4) Does the claimant possess the residual functional capacity to  
20 perform her past relevant work?<sup>5</sup> If so, the claimant is not  
21 disabled. If not, proceed to step five.
- 22 (5) Does the claimant's RFC, when considered with the claimant's  
23 age, education, and work experience, allow her to adjust to  
24 other work that exists in significant numbers in the national  
25 economy? If so, the claimant is not disabled. If not, the  
26 claimant is disabled.

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28 <sup>5</sup>Residual functional capacity is "what [one] can still do despite [ones] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. § 404.1545(a).

1 Stout v. Commissioner, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§  
2 404.1520, 416.920).

3 The ALJ has an affirmative duty to assist the claimant in developing the  
4 record at every step of the inquiry. Bustamante v. Massanari, 262 F.3d 949, 954  
5 (9th Cir. 2001); see also Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005)  
6 (ALJ has special duty to fully and fairly develop record and to assure that  
7 claimant's interests are considered). The claimant has the burden of proof at steps  
8 one through four, and the Commissioner has the burden of proof at step five.  
9 Bustamante, 262 F.3d at 953-54 (citing Tackett); see also Burch, 400 F.3d at 679  
10 (claimant carries initial burden of proving disability). If, at step four, the claimant  
11 meets her burden of establishing an inability to perform past work, the  
12 Commissioner must show, at step five, that the claimant can perform some other  
13 work that exists in "significant numbers" in the national economy, taking into  
14 account the claimant's residual functional capacity, age, education, and work  
15 experience. Tackett, 180 F.3d at 1100 (citing 20 C.F.R. § 404.1560(b)(3)). The  
16 Commissioner may do so by the testimony of a vocational expert or by reference  
17 to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,  
18 Appendix 2 (commonly known as "the Grids"). Id.

## 19 **B. Standard of Review**

20 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
21 benefits only if it is not supported by substantial evidence or if it is based on legal  
22 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
23 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
24 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable  
25 mind might accept as adequate to support a conclusion." Richardson v. Perales,  
26 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
27 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
28 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

1 To determine whether substantial evidence supports a finding, a court must  
 2 ““consider the record as a whole, weighing both evidence that supports and  
 3 evidence that detracts from the [Commissioner’s] conclusion.”” Aukland v.  
 4 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
 5 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
 6 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
 7 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

#### 8 **IV. DISCUSSION**

9 Plaintiff argues that the Commissioner’s determination of non-disability  
 10 should be reversed because the ALJ failed properly to evaluate her subjective  
 11 complaints. (Plaintiff’s Motion at 3).<sup>6</sup> She contends that her statements regarding  
 12 pain and her other subjective symptoms are suggestive of multiple sclerosis and  
 13 should not have been discounted by the ALJ. (AR 6).

##### 14 **A. Applicable Law**

15 An ALJ is not required to believe every allegation of disabling pain or other  
 16 non-exertional impairment. Orn v. Astrue, 2007 WL 2034287, at \*9 (9th Cir. July  
 17 16, 2007) (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record  
 18 establishes the existence of a medically determinable impairment that could  
 19 reasonably give rise to symptoms assertedly suffered by a claimant, an ALJ must  
 20 make a finding as to the credibility of the claimant’s statements about the  
 21 symptoms and their functional effect. Robbins, 466 F.3d 880 at 883 (citations  
 22 omitted). Unless an ALJ makes a finding of malingering based on affirmative  
 23 evidence thereof, the ALJ may reject a claimant’s testimony regarding the severity  
 24 of her symptoms only if the ALJ makes specific findings stating clear and  
 25 convincing reasons for doing so. Id. (citations omitted). The ALJ’s credibility  
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27 <sup>6</sup>As plaintiff does not assert any other basis upon which the ALJ’s non-disability  
 28 determination was allegedly unsupported by substantial evidence, or any other respect in which  
 the ALJ allegedly materially erred, this Court likewise confines its analysis to the ALJ’s  
 evaluation of plaintiff’s credibility.

1 findings “must be sufficiently specific to allow a reviewing court to conclude the  
2 ALJ rejected the claimant’s testimony on permissible grounds and did not  
3 arbitrarily discredit the claimant’s testimony.” *Moisa v. Barnhart*, 367 F.3d 882,  
4 885 (9th Cir. 2004). To find the claimant not credible, an ALJ must rely either on  
5 reasons unrelated to the subjective testimony (e.g., reputation for dishonesty),  
6 internal contradictions in the testimony, or conflicts between the claimant’s  
7 testimony and the claimant’s conduct (e.g., daily activities, work record,  
8 unexplained or inadequately explained failure to seek treatment or to follow  
9 prescribed course of treatment). *Orn*, 2007 WL 2034287, at \*9; *Robbins*, 466 F.3d  
10 at 883; *Burch*, 400 F.3d at 680-81; SSR 96-7p. Although an ALJ may not  
11 disregard such claimant’s testimony solely because it is not substantiated  
12 affirmatively by objective medical evidence, the lack of medical evidence is a  
13 factor that the ALJ can consider in his credibility assessment. *Burch*, 400 F.3d at  
14 681.

15 Questions of credibility and resolutions of conflicts in the testimony are  
16 functions solely of the Commissioner. *Greger v. Barnhart*, 464 F.3d 968, 972 (9th  
17 Cir. 2006). If the ALJ’s interpretation of the claimant’s testimony is reasonable  
18 and is supported by substantial evidence, it is not the court’s role to  
19 “second-guess” it. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

20 **B. The ALJ’s Credibility Assessment Is Based On Substantial**  
21 **Evidence and Is Free from Material Error**

22 This Court concludes that the ALJ’s credibility assessment of plaintiff’s  
23 subjective symptoms and complaints is based on substantial evidence and is free  
24 from material error.

25 Plaintiff’s Motion can be read to argue, at least in part, that the ALJ erred in  
26 concluding that plaintiff’s alleged multiple sclerosis was not a medically

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1 determinable impairment.<sup>7</sup> As noted above, the ALJ must make findings as to a  
2 claimant's statements about particular symptoms and their functional effects only  
3 when the record reflects the existence of a medically determinable impairment that  
4 could reasonably give rise to such symptoms. Here, plaintiff contends that the  
5 testimony of the medical expert who opined that plaintiff's alleged multiple  
6 sclerosis was not medically determinable – testimony which the ALJ appears to  
7 have adopted – is belied by the record. (AR 37, 38, 366-67). Specifically,  
8 plaintiff suggests that the medical expert's opinion is belied by plaintiff's  
9 symptoms, her history of complaints to her doctors, plaintiff's layman  
10 interpretation of the medical record, and information plaintiff has acquired over  
11 the internet. (Plaintiff's Motion at 6). Plaintiff concedes, however, that “no  
12 definitive diagnosis of multiple sclerosis (MS) has been made.” (Plaintiff's  
13 Motion at 6).

14 This Court concludes that the ALJ did not err in adopting the medical  
15 expert's opinion because, as the ALJ's detailed discussion of the evidence reflects,  
16 the expert's opinion was supported by other evidence in the record. See Morgan  
17 v. Commissioner, 169 F.3d 595, 600-01 (9th Cir. 1999) (“Opinions of a  
18 nonexamining, testifying medical advisor may serve as substantial evidence when  
19 they are supported by other evidence in the record and are consistent with it”). For  
20 example, the ALJ noted that Dr. Speier reported that an MRI of plaintiff's brain  
21 did not show plaintiff to have the classic indications of multiple sclerosis, and that  
22 examining physician Dr. Maurice “doubted” that plaintiff had multiple sclerosis.  
23 (AR 41). Although the record also contains conflicting medical opinions, where,  
24 as here, the evidence “is susceptible to more than one rational interpretation,” the  
25 Court must uphold the administrative decision. Thomas v. Barnhart, 278 F.3d  
26 947, 954 (9th Cir. 2002); see also Morgan, 169 F.3d at 601 (where medical reports  
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28 <sup>7</sup>Plaintiff does not argue that the ALJ erred in determining that plaintiff's alleged multiple sclerosis was not a “severe” impairment.



1 are inconclusive, the resolution of conflicts in the evidence is the province of the  
2 Commissioner).

3 Even assuming, however, that the ALJ erroneously refused to characterize  
4 plaintiff's alleged multiple sclerosis as a medically determinable impairment, such  
5 error was harmless because the ALJ in fact made specific findings stating clear  
6 and convincing reasons for rejecting plaintiff's subjective complaints. The ALJ  
7 comprehensively listed his reasons for not crediting plaintiff's subjective  
8 complaints. (AR 43-44). He noted several inconsistencies between plaintiff's  
9 complaints/testimony regarding her symptoms and functional limitations and  
10 either plaintiff's reports to her physicians, findings by such physicians, or  
11 objective medical evidence in the record. The Court will not here discuss each of  
12 the nineteen reasons cited by the ALJ, but will address some of the findings below.

13 First, the ALJ noted that plaintiff's treatment has been conservative and that  
14 the record does not reflect that she requires any special accommodations to relieve  
15 her pain or other symptoms. Plaintiff does not challenge these findings by the  
16 ALJ.

17 Second, the ALJ noted that plaintiff's testimony regarding her muscle pain  
18 was inconsistent with statements she made to her physicians. (AR 44). Plaintiff  
19 testified that she experiences "stabbing" muscle pain in her legs on a daily basis.  
20 (AR 394). However, plaintiff denied having any pain to her physicians at Sierra  
21 Vista Family Care during numerous visits, and described her pain as no more than  
22 moderate during other visits. (AR 44, 173, 174, 177, 179, 183, 184, 185, 189,  
23 192, 254, 255, 257, 258).

24 Third, the ALJ noted that plaintiff's complaints of significant physical  
25 weakness were contradicted by Dr. Karnani's finding on September 29, 2004 that  
26 plaintiff has normal motor strength and the fact that no physician described  
27 plaintiff as having significant physical weakness. (AR 43, 50, 262, 355).  
28 Although plaintiff argues that other parts of the record "show decreased strength,"

1 she does not specifically point the Court to any such observations or findings by  
2 her physicians. (Plaintiff's Motion at 6). Instead she directs the Court only to  
3 citations listed elsewhere in Plaintiff's Motion which purport to identify other  
4 instances in which plaintiff has made statements regarding her pain and other  
5 subjective symptoms. (Plaintiff's Motion at 6). As the ALJ properly focused on  
6 the inconsistency between plaintiff's statements and the observations/findings of  
7 physicians, plaintiff's references to other instances in which plaintiff has made  
8 similar statements, do not undermine the ALJ's findings in this regard.

9 Fourth, the ALJ noted that despite plaintiff complaints that she had  
10 difficulty walking, plaintiff's physicians observed her to have a normal gait on  
11 February 11, 2002, July 10, 2002 and September 29, 2004. (AR 43, 140-41, 245,  
12 250, 262, 355). Although plaintiff again argues that other parts of the record show  
13 that plaintiff has an "abnormal gait," she again does not specifically point the  
14 Court to any such observations or findings by her physicians. (Plaintiff's Motion  
15 at 6). Instead she again directs the Court only to citations listed elsewhere in  
16 Plaintiff's Motion which purport to identify other instances in which plaintiff has  
17 made statements regarding her pain and other subjective symptoms. (Plaintiff's  
18 Motion at 6). For the same reason noted above, the ALJ's findings are not  
19 undercut by plaintiff's claim in this regard.

20 Finally and significantly, the ALJ noted and plaintiff does not dispute that  
21 no physician opined that plaintiff was totally disabled from all employment for any  
22 twelve-month period. (AR 43). See Matthews v. Shalala, 10 F.3d 678, 680 (9th  
23 Cir. 1993) (in upholding the Commissioner's decision, the Court emphasized:  
24 "None of the doctors who examined [claimant] expressed the opinion that he was  
25 totally disabled"); accord Curry v. Sullivan, 925 F.2d 1127, 1130 n.1 (9th Cir.  
26 1990) (upholding Commissioner and noting that after surgery, no doctor suggested  
27 claimant was disabled).

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1 The ALJ appears to have conducted an exhaustive review of the record in  
2 this matter and has provided clear, convincing and specific reasons for discrediting  
3 plaintiff's credibility. The ALJ's credibility assessment of plaintiff's subjective  
4 symptoms and complaints is based on substantial evidence and is free from  
5 material error.

6 **V. CONCLUSION**

7 The decision of the Commissioner is therefore AFFIRMED.

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9 DATED: September 10, 2007

10 \_\_\_\_\_  
11 /s/  
12 Honorable Jacqueline Chooljian  
13 UNITED STATES MAGISTRATE JUDGE  
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